

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:08-CR-99-FL-1

No. 5:11-CV-166-FL

CHRISTOPHER RAY PARRISH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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ORDER

This matter is before the court on petitioner's motion for relief pursuant to Federal Rule of Civil Procedure 60(b) (DE 89). The government responded by filing a motion to dismiss on the basis that the motion is without merit and should be recharacterized as a petition under 28 U.S.C. § 2255. (DE 92). Petitioner claims that the court erred in resentencing him in accordance with United States v. Simmons, 649 F.3d 237 (4th Cir. 2001), arguing that the court did not have authority to depart upward from the recalculated advisory guideline range at resentencing where such departure was not "within the scope of the remand." (Mot. for Relief at 2).

Where this court entered an amended judgment on September 18, 2012, following resentencing hearing, and where petitioner now seeks to correct that amended judgment and the new sentence received, the court must treat petitioner's Rule 60(b) motion as one arising under 28 U.S.C. § 2255. See United States v. Winestock, 340 F.3d 200, 207 (4th Cir. 2003). Therefore, the court notifies petitioner of its intent to recharacterize the Rule 60(b) motion as his first § 2255 motion, warns petitioner that recharacterization will subject any subsequent § 2255 motion to restrictions

on second or successive petitions, and hereby provides petitioner with an opportunity to withdraw, or to amend, the filing.

The court permits petitioner to file a response to the court's proposed recharacterization within twenty-one (21) days from the date of this order. The court advises petitioner that if, within the time set by the court, petitioner agrees to have the motion recharacterized or does not respond in opposition to the recharacterization, the court shall consider the motion as one under § 2255 and shall consider it filed as of the date the original motion was filed. If, however, movant responds within the time set by the court but does not agree to have the motion recharacterized, the court will not treat it as a § 2255 motion but shall rule on the merits of the motion as filed.

SO ORDERED, this the 1st day of November, 2013.

A handwritten signature in black ink, reading "Louise W. Flanagan". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

LOUISE W. FLANAGAN
United States District Judge